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Evidentiary Tactics:

Selecting the "Best" Evidence to Simplify the Case

by Edward J. Imwinkelried and David A. Schlueter



The numbers tell the story. In the first five years of pretrial discovery in *United States v. IBM*, 406 F. Supp. 175 (S.D.N.Y. 1975), the parties produced over 64 million pages of documents. During the discovery phase of another federal suit, *Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291 (9th Cir. 1994), the parties exchanged more than 200 million pages of documents. In these types of cases, it is not good trial advocacy to simply introduce at trial all the information compiled during pretrial discovery. Even if the jury consists of 12 Einsteins, the jurors cannot digest that much information.

In the early 1990s, the American Bar Association Special Committee on Jury Comprehension released the results of surveys of jurors who had participated in complex federal and state cases. (Spec. Comm. on Jury Comprehension, ABA Litigation Section, JURY COMPREHENSION IN COMPLEX CASES 27-28, 31 (1990).) The researchers asked the jurors what complaints they had against the attorneys who had tried the cases. By a wide margin, the primary complaint was that the litigators went overboard and swamped the jury with information, particularly an excessive number of exhibits. In the infamous *McMartin* child abuse prosecution in California, prosecutors called 124 witnesses and introduced 974 exhibits, requiring more than 33 months of trial and consuming nearly 64,000 pages of transcript. (Don L. Benedictis, *McMartin Preschool Lessons: Abuse Case Plagued by Botched Investigation, Too Many Counts*, 76 A.B.A. J. 28 (Apr. 1990).)

Keep it simple

At trial, the attorney must exorcise the demons of complexity and confusion. "[T]he key to winning is being able to simplify in a clear and powerful way. It's the single most important thing to accomplish at trial." (Harry M. Reasoner, *Juries Need Guidance Without Condescension*, NAT'L L.J., Feb. 3, 1992, at S8.) How can the attorney reduce his or her case to manageable proportions that the jury can easily digest? There are strategies as well as tactics that should be employed.

As a matter of strategy, the attorney can radically trim the size of his or her case by relying on a single theory of the case at trial. The theory becomes the litmus test for deciding whether to include an item of evidence in your case-in-chief. The test for admissibility under Federal Rule of Evidence 401 is logical relevance to the facts of the consequence at trial, primarily the facts alleged in the final pleadings. If counsel uses Rule 401 as the litmus test, as in *McMartin*, the case could drag on for months. With the client's consent, counsel should focus on the strongest theory and have the discipline (and confidence) to offer only evidence that contributes to the development of that

theory. Of course, counsel should not forget about, or dispose of, the information pertinent to other theories. The trial may take unexpected turns, and counsel needs to flexibly adapt to the actual developments at trial. Evidence that was not used for the case-in-chief may become handy rebuttal evidence.

Even implementing that strategy, however, is not enough. In a complicated case, there might be scores of witnesses and thousands of documents with information relevant to the theory. From a tactical viewpoint, counsel must be discriminating. If the advocate has done a good job selecting a theory, many of its elements will be formally or virtually undisputed, and counsel should avoid boring the jury by overkill. Although ideally counsel ought to offer a single item of evidence to prove up those elements, as a practical matter, it may be necessary to offer some cumulative testimony. If, for example, counsel calls a witness to establish one element, it might become clear to the jury during the course of the testimony that the witness also has personal knowledge of facts pertinent to another element. In that event, if counsel does not elicit the witness's testimony about the latter element, the jury may become suspicious. For that matter, the opposing attorney may invite the jury to draw an adverse inference.

Moreover, counsel will want to include some corroboration in the case-in-chief on the linchpin element of counsel's theory. Even on that element, however, counsel should not offer every available item of evidence. To achieve simplicity at trial, counsel must select the "best" items of evidence.

Even if, for some reason, counsel decides to be less drastic in paring down the case, counsel should be ready to prioritize the evidence. The judge, either pretrial or during trial, may decide to "move the case along" and demand that counsel limit the number of witnesses or exhibits. Counsel must be prepared for the unexpected, even to the point of jettisoning evidence originally slated for presentation. On short notice, counsel may have to decide which evidence is expendable and which is the best that must be retained in the case-in-chief.

But what does the "best" mean in this context? Some attorneys resolve that question and choose their items of evidence in an intuitive, almost haphazard, manner. There are some empirical investigations of the relative weight that jurors attach to various types of evidence. This article proposes several generalizations as to which types of evidence the litigator should ordinarily prefer and include in the case-in-chief. We realize full well that the reader will probably disagree with some of these generalizations. Yet, we offer them in the hope that this article will prompt more litigators to familiarize themselves with the empirical literature, devote additional time to thinking about this question, and make more deliberate selections of the trial evidence to proffer.

Order of preference among types of evidence

In deciding what evidence to pare from the case, counsel should address the following question: Which types of evidence are most likely to carry significant weight with the trier-of-fact?

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There is no a priori answer. Although the question is essentially empirical, there have been only a few empirical studies, some of which we cite here. We also draw on our limited experience as litigators and our years as teachers of trial and evidence tactics. We do not pretend that all attorneys and judges agree with our order of preference. A proponent of evidence, however, cannot intelligently tackle the initial tactical question unless he or she makes some assumptions about the relative weight of various types of evidence.

Our assumption is that in *descending* order, the following types of "evidence" are most influential with a jury:

- judicial notice by the trial judge (Fed. R. Evid. 201);
- admission by the party-opponent, either in the form of a stipulation or in the form of an evidentiary admission (Fed. R. Evid. 401, 801);
- physical evidence (Fed. R. Evid. 901–2, 1001–08);
- live testimony by a lay witness (Fed. R. Evid. 601–2, 701);
- live testimony by an expert witness (Fed. R. Evid. 702–6);
- documentary hearsay (Fed. R. Evid. 803–4, 901–2, 1001–08); and
- nondocumentary hearsay (Fed. R. Evid. 803–4, 901).

The purposes of this article are to explain this order of preference and add some necessary caveats.

Judicial notice by the trial judge

When a trial judge agrees to judicially notice a proposition, the end result is an instruction from the judge. In many cases, the judge tells the jury point blank to assume that a particular fact is true or that a certain event occurred. On the downside, a judicial instruction may be less dramatic than live testimony. The instruction might be bland compared to the testimony of a charismatic witness.

There are many upsides to judicial notice, however. (Edward J. Imwinkelried, *Post-Daubert Notice*, NAT'L L.J., Dec. 24, 2001, at B11.) First, it can save the proponent a substantial amount of money. For example, if the judge agrees to judicially notice a scientific proposition, it may obviate the proponent's need to call an expert to present live testimony that could have cost the client thousands of dollars. Second, judicial notice can save trial time and radically simplify the proponent's presentation. Again, in substantial cases today, the primary evils the proponent must banish are complexity and confusion. While live expert testimony about a proposition can consume several hours, it might require only a minute or two to read the jury the instruction on the judicially noticed fact. In our view, simpler is almost always better.

In modern trials, judicial notice is an attractive option. To begin with, judicial notice is more readily available today. Although in the past, courts and commentators sometimes used

the shorthand expression "verifiable certainty" to describe the standard for noticing scientific propositions, the governing statutes, such as Federal Rule 201(b), do not incorporate the term "certainty." Rather, they typically announce a more relaxed standard: A proposition that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" may be judicially noticed. In *Daubert*, the U.S. Supreme Court observed that "arguably, there are no certainties" even in hard science. (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993).) The Court acknowledged the realistic limits to scientific investigation. That acknowledgment should make trial judges even more receptive to judicial notice requests.

Furthermore, the jury tends to attach great weight to the trial judge's statements. Jurors are inclined to discount statements by the "hired gun" attorneys. (Mark Dombroff, *Jury Instructions Can Be Crucial in Trial Process*, LEGAL TIMES, Feb. 25, 1985, at 26.) In contrast, jurors "typically listen more closely and weigh more heavily almost everything said to them by the judge." Both the courts and psychological researchers concur that jurors are likely to assign special weight to a judge's instruction because jurors view the judge as an impartial authority figure. (*United States v. Hickman*, 592 F.2d 931 (6th Cir. 1979) ("a trial judge's position before a jury is 'overpowering.' His position makes 'his slightest action of great weight with the jury'"); Mark Dombroff, *supra*; Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 150–51 (1985) (research by Harvard psychologist Robert Rosenthal).)

Although a judicial notice instruction rates at, or near, the top of the order of preference, case-specific factors can control. In federal practice, one factor is whether the case is criminal or civil. In a civil case, a judge may instruct the jurors that they must accept a judicially noticed proposition as conclusively established. Under Federal Rule of Evidence 201(g), however, the judge may not deliver such an instruction in a criminal case. In a criminal trial, the judge can tell the jurors only that they may—but not must—accept the truth of the noticed fact. Especially when the case is a criminal one, the proponent should compare the personality of the judge with that of the witness the proponent would otherwise call to prove up the fact. If the judge has a forceful courtroom demeanor and is likely to deliver the instruction in a powerful manner, a judicial notice instruction might still be preferable. But if the judge has a less commanding courtroom presence and the witness is particularly engaging, it would be wiser to present the live testimony.

Admission by a party-opponent

Most jurors know that ours is an adversary system of litigation, and they consequently attach special weight to concessions by the party-opponent. For that reason, Louis Nizer made it a practice to stress admissions during summation; he emphasized that he had proven his case "out of the mouths of our very

adversaries.” (*Trial Preparation: An Interview with Louis Nizer*, 2 TRIAL DIPL. J. 6, II (Spr. 1979).)

The admission can take the form of a formal stipulation between the parties or a mere evidentiary admission, such as live testimony about a statement made by the party-opponent. There are downsides to choosing an admission, though. A stipulation in particular might lack drama. Further, by accepting a stipulation tendered by the opponent, the proponent could lose the right to present especially impressive testimony; the opponent might be offering the stipulation only because he or she does not want the jury to hear the testimony of a very credible witness. Finally, unless the opponent is willing to reduce the stipulation to writing before trial, the agreement to the stipulation can unravel at trial; the parties might have a falling out over the tenor of the agreed stipulation.

Nevertheless, at least when the opponent agrees to reduce the stipulation to written form, stipulations afford the proponent many of the same advantages as judicial notice. Again, a stipulation with the opponent can save the proponent both money and time. Like a judicial notice instruction, a stipulation or other admission can help the proponent simplify his or her trial presentation. For that reason, unless the stipulation deprives the proponent of the opportunity to present especially convincing testimony, the stipulation usually works to the proponent’s advantage.

Physical evidence

When a judge takes judicial notice, the judge tells the jury to accept a fact as proven. In an admission, the party-opponent vouches for the fact. Failing judicial notice or an admission, what are the proponent’s alternatives?

One of the most potent alternative methods of establishing a fact is to proffer physical evidence of the fact. Dean John Henry Wigmore counseled litigators to proffer physical evidence. He noted “the general mental tendency” of the trier of fact to accept “corporeal object[s]” offered as evidence. (7 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 2129–30 (Little, Brown & Co. 3d ed., 1940).) In his experience, the jurors’ very “sight of the” object tends to “corroborat[e]” the testimony of the sponsoring witness. (*Id.*) The jurors can see the corporeal evidence for themselves, and they trust their own observations more than statements by either witnesses or trial attorneys.

Psychologists also believe that physical evidence carries great weight during jury deliberations. In the short term, jurors more readily understand information presented in sensory form. Some studies indicate that while we gain only 10 percent of our information about the external world exclusively through the sense of hearing, we gather 85 percent of the data from the sense of sight. (Peter Perlman, *Preparation and Presentation of Medical Proof*, 2 TRIAL DIPL. J. 18 (Spr. 1979).) In the long term, presenting corporeal proof of a fact helps the jury remember the fact during deliberations. Some researchers

have found that the long-term retention of information more than doubles when a person can both hear and see the information. (Ronald Briggs, “Real and Demonstrative Evidence” 4 (unpublished manuscript on file with the National College of District Attorneys, University of South Carolina Law School.) You not only want to impress the jury when you introduce the evidence, but, more importantly, you also want the exhibit to influence the jury deliberations, which might occur days, weeks, or even months after the introduction of the evidence. To some extent, during closing you can refresh the jury’s memory of exhibits previously introduced; but it is best if you strongly imprint the evidence into the jury’s memory at the time of its introduction. An item of physical evidence is especially likely to help the jury remember the testimony of the sponsoring witness when the judge sends the exhibit into the deliberation room. (*United States v. Williams*, 87 F.3d 249, 255 (8th Cir. 1996).) The exhibit can then serve as a constant, visual reminder of the witness’s testimony.

There is a wide variety of types of physical evidence. The simplest and most powerful can be the display of an item of original or historical physical evidence; for example, the actual drugs or the actual knife. (Paul C. Giannelli, *Chain of Custody and the Handling of Real Evidence*, 20 AM. CRIM. L. REV. 527 (1983).) Or the proponent can ask the judge for permission to display a demonstrative physical exhibit to the jury. Even if the police cannot locate the knife allegedly brandished by a defendant, the judge can allow the prosecutor to use a similar weapon to illustrate and dramatize the victim’s testimony. When the jury can visualize the victim’s version of the events, the jury is more likely to accept that version.

A demonstration is a step beyond a passive exhibition or display of an object. In a demonstration, the attorney shows the jury a process in action. In one medical malpractice trial, a defendant doctor reenacted an appendectomy on a small platform before the jurors. (Roger K. O’Reilly, *Defending a Doctor Against All Odds*, 72 A.B.A. J. 44, 45 (Mar 1, 1986).)

Probably the rarest type of physical evidence is a jury view, where the jury is transported to a site outside the courtroom to view a relevant object or scene. In the *O.J. Simpson* prosecution, Judge Ito permitted the jurors to be escorted to the accused’s residence to help them understand some of the more complex testimony.

As the proponent moves from (1) the display of original evidence to (2) the display of demonstrative evidence to (3) an in-court demonstration and finally to (4) a jury view, the odds diminish that the judge will allow the proponent to resort to the physical evidence. When an assault victim asks permission to demonstrate the limited mobility of his or her arm, there is a risk of feigning that simple displays do not pose. Judges are especially reluctant to grant requests for jury views. Depending on the site to be visited, a view can be a logistical nightmare. If the proponent has control of the object or site to be viewed, the view must be carefully planned. The proponent should plan the jurors’ route to the view and ensure that the area has been

cleared. An unanticipated encounter during the view could trigger a mistrial. Even with the most careful planning, the unexpected can occur.

In the celebrated "Twilight Zone" manslaughter trial, producer John Landis found himself defending allegedly dangerous conditions in an outdoor Vietnam battle set where Vic Morrow and two child actors were killed in a crashing helicopter. The jurors were taken to view the actual scene of the accident. In the middle of the proceeding, a large helicopter made an unexpected fly-by. The defense moved for a mistrial, claiming that the unanticipated presence of the helicopter had a powerful emotional effect on the jurors.

(Ashley S. Lipson, "Real" Real Evidence, 19 LITIGATION 29, 32 (Fall 1992).)

Live testimony by lay witness

As a general proposition, live testimony by a percipient witness ordinarily is preferable to reliance on hearsay. There is a substantial body of research indicating that in evaluating testimony, jurors tend to attach significant weight to demeanor. What researchers have discovered is that:

- [J]uries thought the child's in-court statements were significantly more likely to be complete than the child's before-court statements.
- [J]uries rated the child's likelihood of correctly identifying the abuser in court as higher than the child's likelihood of correctly identifying the abuser before court.
- [J]uries rated the child's in-court statements as more important to their vote of guilt or innocence in comparison to the child's before pre-court statements.

(Gail S. Goodman, John B. Myers, Allison Redlich, Lori P. Priznich & Edward Imwinkelried, *Jurors' Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 PSYCH., PUB. POL'Y & LAW 388 (1999).) Jurors respond to the confidence level displayed by live witnesses in their nonverbal demeanor. (Felice J. Levine & June Louin Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079, 1081 (1973).) There is a growing body of data suggesting that, in part because they know they are being denied relevant demeanor, jurors ascribe less weight to hearsay evidence. (Richard F. Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655 (1992); Peter Miene, Roger C. Park & Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683 (1992); Margaret Bull Kovera, Roger C. Park & Steven D. Penrod, *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703 (1992).)

A further advantage of live testimony is that it gives the proponent more flexibility at trial. When there is an unforeseen de-

velopment at trial, the proponent can consult with the witness and make appropriate adaptations on redirect or during rebuttal. Adaptation may be impossible when the source of the information is an unavailable hearsay declarant.

Live testimony by expert witness

Just as the proponent should prefer live lay testimony to hearsay, we also believe that live lay testimony is preferable to live expert testimony. Our assumption is that simpler is better. It is easier for the jury to understand the testimony by a percipient lay witness, and the jurors can more readily identify with a fellow layperson.

Our view is probably at odds with the conventional wisdom. In the past 20 years, the use of expert testimony has skyrocketed. As recently as 1974, the *Jury Verdict Reporter for Cook County, Illinois*, listed only 188 regularly testifying experts. As one commentator noted, "[t]oday, there are more than 3,100, a 1,540% increase." (Andrew Blum, *Experts: How Good Are They?*, NAT'L L.J., July 24, 1989, at 1.) In part, that increase has been fueled by a widespread belief among litigators that expert testimony impresses lay jurors. We are skeptical of that belief. Many litigators too quickly assume that an "expert" is required.

To be sure, there are cases when the proponent must resort to expert testimony. In a legal or medical malpractice case, for example, the law usually requires the proponent to present expert testimony to make out a prima facie case. Or there simply may not have been any eyewitnesses to the crucial event. Absent the benefit of direct testimony, the jury may need the assistance of a pathologist or accident reconstructionist to connect the dots of the circumstantial evidence. In all these cases, the proponent has no choice but to proffer expert testimony to get to the jury.

In many cases, however, the proponent has a choice. When there is a choice, we recommend that the proponent initially present only the lay witness and hold the corroborating expert testimony in reserve for rebuttal. Admittedly, appellate courts often assert that jurors assign great, even inordinate, weight to expert evidence. (Edward J. Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 28 VILL. L. REV. 554, 562-63 (1983) (collecting cases from California, the District of Columbia, and Maryland).) Although there has been little empirical investigation of this question, the findings in most of the available studies are at odds with the courts' ipse dixit assertions. (Anthony Z. Roisman, *Surviving the Daubert Attack: Staying Focused*, 14 THE PRACTICAL LITIGATOR 43, 48 (Nov. 2003) ("there is a wealth of empirical evidence which directly refute [the] premise" that lay jurors are incompetent to critically evaluate expert testimony).) In one study involving sound spectrography or voiceprint evidence, the researchers found that the conviction rate dipped when prosecutors proffered the expert testimony. (Henry F. Greene, *Voiceprint Identification: The Case in Favor of Admissibility*, 13 AM. CRIM. L. REV. 171, 173-89

(1975).) In another study conducted by Dr. Elizabeth Loftus, mock jurors were more willing to convict on the basis of an identification by seemingly confident eyewitnesses than on the basis of fingerprint evidence. (Elizabeth Loftus, *Psychological Aspects of Courtroom Testimony*, 347 ANNALS N.Y. ACAD. SCI. 27, 32–33 (1980).) After canvassing the studies, two commentators concluded that “[t]he image of a spellbound jury mesmerized by . . . a forensic expert is more likely to reflect . . . [judicial] fantasies than the . . . realities of courtroom testimony.” (Richard Rogers & Charles Patrick Ewing, *Ultimate Opinion Proscriptions: A Cosmetic Fix and a Plea for Empiricism*, 13 LAW & HUM. BEHAV. 357, 363 (1989).)

When *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) was pending before the Supreme Court, several eminent researchers filed an amicus brief setting out an excellent collection of the empirical research. (BRIEF AMICI CURIAE OF NEIL VIDMAR, RICHARD O. LEMPERT, SHARI SEIDMAN DIAMOND, VALERIE P. HANS, STEPHAN LANDSMAN, ROBERT MACCOUN, JOSEPH SANDERS, HARMON M. HOSCH, SAUL KASSIN, MARC GALANTER, THEODORE EISENBERG, STEPHEN DANIELS, EDITH GREENE, JOANNE MARTIN, STEVEN PENROD, JAMES RICHARDSON, LAITY HEUER, AND IRWIN HOROWITZ IN SUPPORT OF RESPONDENTS, *KUMHO TIRE CO. V. CARMICHAEL*, No. 97–1709.) The brief concludes that the available data do not bear out the frequent assertion that juries “quickly defer to experts (suspending their critical judgment). . . .” (*Id.* at 4.) In the words of the brief, “none of the studies indicates that jurors . . . just defer to expert testimony.” (*Id.* at 18.)

In light of these studies, when a lay percipient witness has a confident demeanor and no seeming stake in the outcome of the case, counsel should seriously consider relying on the lay testimony rather than expert evidence. The choice might differ if the expert were extraordinarily well qualified or charismatic. In the typical case, however, the proponent should stress the lay testimony at least in the case-in-chief. Counsel can take a minimalist approach to expert testimony and seize “the high ground” of the lay testimony, which the jurors can easily grasp. (Roger Rook, *Take the High Ground: A Practical Approach to Meeting the Insanity Defense*, PROSECUTOR’S DESKBOOK 598 (Nat’l Dist. Attys. Ass’n 1971).)

Documentary hearsay

There are times when documentary hearsay is preferable to live testimony. For example, presenting live testimony might be too expensive:

In an absolute sense, the fee for [an] expert’s personal appearance might be too high. In a relative sense, other, more critical items of evidence might be so expensive to prepare that there would be insufficient funds [left] to pay for live expert testimony.

(Edward J. Imwinkelried, *Presenting Scientific Evidence in Hearsay Form*, 32 CRIM. L. BULL. 187 (Mar. Apr. 1996).)

Or the witness might have a terrible demeanor. The proponent’s pretrial contacts with the witness could lead the proponent to conclude that the witness has poor eye contact, hesitates before every answer, or has a nervous habit of wiping his brow. Or, the witness may be too combative on cross-examination:

The jury may attach more weight to a written report than to the witness’s live testimony. Offering the . . . evidence in hearsay form would inform the jurors of the helpful, substantive content of the [testimony] without exposing the jurors to the [obnoxious] nonverbal conduct that might lead them to discount the [testimony].

(*Id.* at 187–88.)

The witness’s impeachability could furnish another reason for preferring the presentation of the witness’s information in hearsay form. It is true that under Rule 806, the opponent can impeach a hearsay declarant. (Matthew Faber, *Legal Backbiting: The Life and Times of Evidence Rule 806*, 17 THE CHAMPION 4 (Sept./Oct. 1993).) As a practical matter, though, opposing attorneys frequently neglect to offer evidence to impeach hearsay declarants. Realistically, by presenting the evidence in hearsay form, the attorney reduces the likelihood that the jury will ever learn of the facts impeaching the witness’s credibility.

Finally, the proponent might fear that on cross-examination of the live witness, the opponent could elicit facts damaging the proponent’s theory of the case. If the opposition wants to adduce the additional facts that strengthen its case, it will have to call the person as a witness. This might be risky. The net effect of offering the evidence in hearsay form is that the jury learns the facts favoring the proponent’s theory without being exposed to the facts undercutting the theory.

Nondocumentary hearsay

If the jurors can visualize information, the information is more likely to register in their memories. (John E.B. Myers, Alison D. Redlich, Gail S. Goodman, Lori P. Prizmich & Edward Imwinkelried, *Jurors’ Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 PSYCH., PUB. POL’Y & LAW 388 (1999).) The late Irving Younger urged attorneys to use documentary evidence, asserting that something reduced to writing tends to have an inherent credibility in the juror’s eyes. His urging makes sense in light of the research documenting the importance of physical evidence. As noted above, in the long term, the jurors are more likely to retain information presented visually. Again, as an exhibit, a written document can be sent to the jury room during deliberation. Counsel should not assume, however, that every admitted exhibit can be sent into the deliberation room. Under some documentary hearsay exceptions, the proponent may introduce the exhibit and read it aloud to the jury, but is precluded from submitting it to the jurors for their physical inspection. (See Fed. R. Evid. 803(5), 28 U.S.C.A.)

Given a choice, a proponent ought to prefer documentary hearsay rather than nondocumentary hearsay. If the choice is between a business entry and an excited utterance, the proponent ordinarily should select the business entry. The same preference extends to government and past recollection recorded documents.

Conclusion

A leading contemporary commentator on trial practice, Professor James McElhaney, has stressed that one of the key challenges facing a trial attorney is eliminating the "clutter" from his or her case-in-chief. (James McElhaney, *Clutter*, 77 A.B.A. J. 73 (Mar. 1991).) The upside of the broad scope of modern pretrial discovery is that it enables the attorney to better prepare for trial. However, the expanded scope of pretrial discovery is a two-edged sword. One of the major downsides of the broad scope is that the attorney is tempted to introduce at trial all the information that the attorney has fought so hard to discover. To avoid overwhelming the jury, the attorney must resist temptation. One strategic technique to achieve simplicity is reliance on a single theory of the case at trial. Even the use of that technique is not enough, however. As a matter of tactics, the attorney must go farther and exercise selectivity in choosing the very "best" evidence to present to the jury. And determining the best evidence requires counsel to determine the preferred forms of evidence.

Hopefully, this article will encourage the reader to invest more time thinking about the question of which types of evidence are "best." Of course, the generalizations have to yield to case-specific, situational factors. Selectivity, however, is so critical in a complex case that litigators cannot afford to rely purely on rote or intuition to choose the items of trial evidence. Empirical studies contain some helpful guidance, and other guidance can arguably be gleaned from more informal experience. The only truth the jury knows is the old story by our evidence, and we owe it to our clients to ensure that we select the best evidence to tell the simplest, most compelling story. ■

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Reading & Research Resources

For more in-depth analysis of the topics discussed in this article, refer to the following resources:

Discovery

- "Rule 34: Controlling the Paper Avalanche" by Michael A. Pope in *Litigation* magazine, volume 7, page 28, spring 1981.
- "Coordinating Complex Discovery" by Irwin J. Sugarman in *Litigation* magazine, volume 15, page 41, fall 1988.

Single theory

- *Dynamics of Trial Practice: Problems and Materials* by Ronald L. Carlson and Edward J. Imwinkelried (3d ed. 2002).

Order of evidence

- *Federal Evidence Tactics* by Edward J. Imwinkelried and David A. Schlueter (Matthew Bender rev. 2003).

Opposing party concessions

- *Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials* by Roben E. Klonoff and Paul L. Colby (Michie Pub. Co. 1990).

Physical evidence

- "Demonstrative Evidence and the Adequate Award" by Melvin Belli in *Mississippi Lawyer*, volume 22, number 1, page 284 (1951).
- *Modern Trials* by Melvin Belli (West Pub. Co., 2d ed. 1982).

Live witness testimony and demeanor

- *Questioning Techniques and Tactics* by Jeffrey L. Kestler (Shepard's/McGraw-Hill 1982)
- *Communication Strategies for Trial Attorneys* by K. Phillip Taylor, Raymond W. Buchanan, and David V. Strawn, page 49 (Scott, Foresman & Co. 1984)
- "Non-Verbal Communications in the Courtroom" by Stephan H. Peskin in *Trial Diplomacy Journal*, volume 3, page 8, winter 1980.
- "Why Jurors Don't Heed the Trial" by Arthur D. Austin in the *National Law Journal*, Aug. 12, 1985, page 8.

Lay witnesses v. experts

- "A Minimalist Approach to the Presentation of Expert Testimony" by Edward J. Imwinkelried in the *Stetson Law Review*, volume 31, page 105 (2001).
- "Trial by Data: Psychological Research as Legal Evidence" by Elizabeth Loftus and John Monahan in the *American Psychologist*, March 1980, page 276.
- "Reliability of Eyewitness Identification" by Lawrence E. Taylor in *Criminal Defense*, volume 9, page 7 (Sept.-Oct. 1982).



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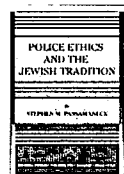
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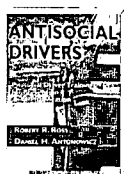


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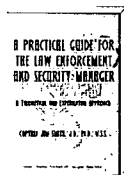


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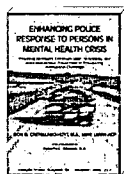


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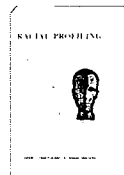
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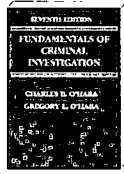


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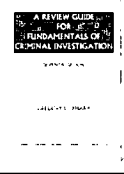


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